Application of US antitrust law in the telecommunications industry in an era of rapid change

Wm Randolph Smith, Jeffrey Blumenfeld and Robert M Halperin
Crowell & Moring LLP

No other industry is experiencing the rapid and fundamental changes occurring throughout the telecommunications sector. These changes will profoundly alter both the commercial marketplace and the regulatory environment in which these services are offered. As FCC chairman Kevin Martin recently said:

"Advances in technology are leading to a convergence of multiple platforms. This development of intermodal competition is fundamentally changing the way that both carriers and their customers use telecommunications and technologies. Given these market changes, we can move towards a more deregulated, competitive environment. One undistorted by regulatory arbitrage and artificial distinctions. And one with competition leading to higher quality, more innovative services, and cheaper rates."[1]

The marketplace and regulatory changes have led, and will continue to lead, to changes in the application of US antitrust laws to this industry. They will alter how courts and regulators define product and geographic markets and how they assess the existence of market power. Moreover, since the scope of the obligations imposed by antitrust law on larger industry players is affected by the scope of regulation, regulatory changes will affect the outcome of antitrust litigation.

Impact of dramatic technological change

It would be difficult to overstate the pace and extent of change in telecommunications technology over the past few years, or the impact the changing technology will have on the business, as well as on antitrust and regulatory oversight. The two most fundamental results of these technology developments are seen in the manner in which services can be provided over a network, and in the vastly improved bandwidth capability of wireless technology.

Dramatic improvements in digital compression, IP data traffic handling, communications protocols, and related technologies make it inevitable that, in the near term, all 'telecom' services will be provided as applications over a common broadband network. One example is IP-based voice, commonly known as 'voice over IP' or 'VoIP', which converts analogue voice signals to data bits at one end, and converts back to analogue (sound) at the other end. Between the ends, the voice signals travel as packetised bits that can be handled more or less as any other data. 'Video' similarly can be converted and transmitted as bits (as it is for digital cable). So long as the physical network ('Layer 1' in OSI terms) is capable of supporting the required data speed, any of these services will produce at least as good quality in digital form, and most will appear to the user in higher quality than their analogue equivalents.

Equally dramatic improvements in wireless technology, both standards-based and proprietary, mean that wireless networks now can provide nearly the same bandwidth, and the same quality of transmission, as their wired counterparts. Wireless transmission has been widely used in telecommunications for more than five decades, in long-haul and network backbones since the advances in microwave transmission technology funded by the government during World War II. But only in the last 25 years has wireless connectivity for user telecom devices been feasible in the mass market. While penetration rates for wireless telephony ('cellular') services grew slowly in the early 1980s, today wireless telephony has overtaken wired telephony in many parts of the world, and is close to the same achievement in the US. The number of wireless subscribers in the United States has increased from less than 90,000 at the end of 1984,[2] to nearly 194 million at the time of writing[3], as compared with a total US population of nearly 296 million.[4]

The Federal Communication Commission recognised the rapid and massive shift to wireless voice technologies, and the impact that the shift has had on all services within the traditional telephone industry, as early as two years ago:

"The long distance, local, and the payphone segments of wireline telecommunications have all been losing business to wireless substitution. Long-distance volumes and revenues are down at AT&T, MCI, and Sprint as customers shift to wireless services to make their calls. Verizon, SBC, and Bellsouth saw business and consumer access lines fall 3.6, 4.1, and 3.2 per cent, respectively, in 2002, for a total decrease of 5.5 million lines, with wireless substitution being a significant factor."[5]

While the data on 'cord-cutting' among businesses is limited, there is no disputing that the migration of local calls from wireline to wireless is significant. According to an In-Stat survey, "[w]ireless phone penetration [in 2004] is highest in the smallest companies—approximately 92 per cent of employees at [these] companies [4 or fewer employees] use wireless phones."[6] Small businesses (those with 5 to 99 employees) have a penetration rate of 67 per cent and mid-sized businesses (those with 100 to 999 employees) are at 50 per cent penetration.[7]

The group of wireless telephony services collectively referred to as 'cellular' have significant inherent bandwidth limitations, because the systems and technologies were designed for voice, rather than for data. But a new set of wireless technologies, which began to emerge in the late 1990s, have an entirely different premise: to provide a broadband platform over which all services could be provided as applications. Several of these are already in commercial use at the time of writing, and others are in commercial trial.

The first to gain mass market acceptance was the 802.11 standards-based technology now known as WiFi, which initially offered up to 2 Mbps in bandwidth, and soon increased to 11 Mbps in the 802.11b specification for the 2.4 GHz band.[8] The 802.xx standards have continued to evolve since 802.11, leading more recently to 802.16, commonly known as WiMax, which is capable of 40 Mbps in fixed and nomadic applications, and 15 Mbps in mobile deployments[9] and has greatly increased range. A different wireless approach is taken by Qualcomm's CDMA 20001xEV-DO technology, which is a form of wideband CDMA (WCDMA), is compliant with the 3G standards of CDMA2000, and is currently offered by Verizon and Sprint.[10]

Several companies have developed proprietary technologies for which they claim even greater bandwidth and range, as well as improved security and traffic handling capability, than is offered by the standards-based technologies. IP Wireless has deployed commercially in several countries and is trialling in the US a proprietary technology that is based on the 3G UMTS TD-CDMA standard.[11] Aperto

offers its branded PacketWave technology, which uses a form of TDMA somewhat similar to that adopted by the IEEE 802.16a Working Group, in which Aperto played a part.[12] NextNet claims coverage across a cell footprint of 18 miles (30 km) for its NLOS (non-line of sight) technology, with commercial deployments in Asia, North America, Mexico, and elsewhere in Latin America.[13]

And, while these technologies are still in the early stages of limited deployment, Verizon's deployment of 1xEV-DO is among the first of what are likely to be major deployments by large-scale US companies.

Most recently, as a condition of receiving FCC permission to complete their merger, the combined Sprint–Nextel agreed to use its nationwide spectrum allocation at 2.5 GHz to offer fixed wireless broadband service to 15 million subscribers within four years, and double that number within six years.[14] This may well jump-start the deployment of fixed wireless broadband service—by both nationwide and regional providers, and by both incumbents and several well-funded newer providers, such as Clearwire[15]—and therefore could signal a tipping point in terms of both number of providers, and number of subscribers. If so, it would mean that what has recently become a contest between existing cable and telephone companies, could soon be a race among three or four or more providers offering broadband service to upwards of 80 per cent of the population.

These tectonic technology changes push against the constraints of traditional regulatory 'pigeonholes' and are rapidly undermining traditional antitrust 'product market' definitions as well. Historic regulation focused on discrete categories of services (voice, data, video), as well as of customers (business, residential), as well as of distance (local and long distance). New technologies already have made nonsense of these distinctions. Cellular telephony has taught users that they can communicate from anywhere; the capability is no longer tied to a physical location. The internet (particularly, Layer 3 routing) has taught users that they can interact with information that is located anywhere; a user's computer can put that user simultaneously in the Louvre in Paris and the Metropolitan Museum in New York, all with little cost and virtually no delay. And, of course, WiFi has taught users that they can be anywhere and interact with information anywhere; both the user's and the information's location are irrelevant. If a user is working from a park bench in California having a worldwide four-way VoIP/video conference call from her computer to jointly edit a document, the appropriate regulatory 'pigeonholes'—offered the traditional choices of local/long distance/voice/data/residential/business—are either 'all of the above' or, more realistically, 'none of the above'.

Regulators have begun to take notice. In the US, for example, the FCC first dealt formally with this issue in the 1998 Stevens' Report,[16] which announced that the Commission would not draw any final conclusions in the absence of a more developed record, but offered three preliminary conclusions: (1) 'computer-to-computer' IP telephony is an 'information service' that is not subject to traditional telephony regulation,[17] (2) 'phone-to-phone' VoIP may be treated as a regulated telecommunications service if it had other characteristics of PSTN telephony,[18] and (3) VoIP calls between 'computers' and 'phones' could not be classified without a full record developed in a formal proceeding.[19]

More recently, in the Free World Dialup Petition, the Commission decided that a service consisting of a server-based intermediation among peer-to-peer SIP-based VoIP subscribers, is neither 'telecommunications' nor a 'telecommunications service' subject to telephony regulation, but rather is an unregulated 'information service'.[20] The FCC noted its decision was taken "to remove any regulatory uncertainty that has surrounded Internet applications such as FWD. We formalise the Commission's policy of non-regulation to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels... [O]ur action is part of a number of initiatives that are designed to bring the benefits of Internet protocol-based (IP-based) services to American consumers."[21]

However, the Commission attached significant caveats to its decision: "This declaratory ruling addresses FWD only to the extent it facilitate free communications over the Internet between one on-line FWD member using a broadband connection and other on-line FWD members using a [sic] broadband connection. Therefore, we specifically decline to extend our classification holding to the legal status of FWD to the extent it is involved in any way in communications that originate or terminate on the public switched telephone network, or that may be made via dial-up access."[22]

The FCC deferred those larger questions to its then-promised proceeding to examine and determine all issues related to IP-enabled services, a proceeding in which the FCC has still not released an order.

So, despite seven years since the issuance of the Stevens' Report, the FCC has not moved much beyond those tentative conclusions. While there is little controversy today about the first determination of 'computer-to-computer' VoIP, the other two pronouncements—that 'phone-to-phone' VoIP is regulated telephony, and that it is 'too soon to determine' the classification of 'phone-to-computer' VoIP—are unlikely to be sustainable, as VoIP services and customers become ever more sophisticated and widely used.

For example, a call that originates or terminates on a 'regular' telephone is subject to traditional telephone regulation, even if a portion of the call is handled as IP in the network. The problem with this approach is even shown by current market realities; many VoIP 'providers' are selling an integrated device that provides connectivity to a traditional telephone instrument through an RJ-11 jack, and contains the microprocessor and software to convert between analogue and digital IP.

The FCC continues to have significant difficulty in deciding the more important issues relating to how it will treat calls that involve interconnection between IP-telephony and the traditional dial-up public network (PSTN). A decision in November 2004 appeared to offer promise of deciding these questions, as it pre-empted an effort by the Minnesota PUC to apply state regulatory rules to Vonage's VoIP service; however, the Commission explicitly declined to declare what the federal rules would be.[23]

And despite releasing a notice of proposed rulemaking in March 2004 entitled 'In the Matter of IP-Enabled Services', FCC 04-28, as of this writing, the Commission has still not released even a first report and order on the fundamental issues of IP telephony.[24]

The FCC has been somewhat more forthcoming in its analysis of telecommunications markets on the issue of the fit between wireless and wired telephony for purposes of defining markets. In recent merger analyses, the FCC determined that there is only 'one-way' substitution between wired and wireless telephony: wireless is a substitute for (and therefore should be included in the market when analysing issues in) wired telephony, but when analysing issues in wireless telephony, wired telephony is not in the same market.[25] This distinction is both rational and sustainable in the near term. And the fact that wired telephone tethers a user to a particular location for network access, while wireless does not, means that the distinction should be sustainable in the long term as well.

The Commission is also attempting to harmonise its approach to historically disparate technologies that are converging on delivering similar services. So, for example, the Commission recently determined in the 'Brand X' case that cable-system-based internet access, like telephone-system-based internet access, should properly be recognised as a single 'information' service, not subject to traditional telephone regulation, and not as a combination of a more regulated telephone service (the transport medium/service) plus a less-regulated information service (the internet access service).[26] While an intermediate federal court disagreed, the Supreme Court recently upheld the Commission's

right to decide the issue, as well as the validity of the Commission's determination.[27]

These examples from the realm of regulation illustrate equally well the tension between new technologies—or rather the uses to which these technologies will be put by entrepreneurs and their customers—and traditional antitrust definitions in the industry.

Traditional market definitions have a questionable future. For example, cable television and satellite video are most often viewed as in the same 'market', whereas broadcast is traditionally viewed as being in a different market. The internet has not traditionally been analysed as part of either video product market. But these conceptions may change. As digital video compression improves and broadband becomes both faster and more ubiquitous, consumers can get both streaming real-time video[28] as well as on-demand movies for viewing on their computers. A company called Movielink[29] is already making a limited set of movies available for viewing on an internet-connected computer. And Hollywood studios recently have agreed on standards for digital distribution of movies, at least to movie theatres, but possibly also signalling that they hope to do for movie distribution what the iPod and its imitators have done for music distribution.[30] Once 'online' movies become a significant factor, it may become logical that at least the satellite, cable, and online movie markets would be analysed together, or that broadcast and internet-streamed video would be in the same market, or that online movies and rental movies would be in the same market, or that all would.

As voice, data, and video all become IP-based 'applications' that can be delivered over any broadband infrastructure, the cost structure of delivery changes dramatically. The traditional copper-based wired telephone network was based on technology for which the costs varied directly (and even dramatically) with distance. The evolution over the past few decades to fibre deployed ever closer to the edge of the network decreased significantly the distance sensitivity of the network's cost structure. And in many new services, the pricing structure followed, with prices based on available capacity rather than on time or distance or 'units' of information moved. The cost structure of fibre-based networks has also resulted in prices that are not only structured differently, but also are significantly lower, for a given amount of information moved between two points.

The transformation of all traditional telecom services—voice, data, and video—into IP-based applications will both benefit from and accelerate this pricing trend. Indifferent to the Layer 1 physical infrastructure, these applications will migrate to the most efficient physical networks, which will also price services based on capacity used, rather than on units of information moved or distance or time. The end-to-end connection between the content provider and the consumer, including content aggregation and network provider, will be transparent bandwidth, priced according to the required capacity/bandwidth/speed.

This price structure, enabled by the cost structure of the new technologies, will result in dramatically reduced barriers to entry. The physical infrastructure will be required to be increasing transparent, and therefore increasingly undifferentiated. The value will be in the content, whether that content is a conversation, a home video shared with family, a movie rented online, or any work product.

To achieve the transparency that will be required by users, the network (Layer 1) providers will have to offer universal connectivity, which in turn will require them to interconnect with each other as efficiently as possible; a network provider who attempts to impose limits on 'reach' or to artificially reduce the 'quality' of transport will quickly suffer loss of market share, as the 'bits' move to more efficient, higher quality, networks with better reach.

And pressure on wired networks will intensify as wireless technologies are more widely deployed. The network world will continue to evolve rapidly from the wired telephone and cable networks, to a multi-provider environment of telephone, cable, fixed broadband wireless, and the next generation of 'cellular' wireless networks. Add to these the public networks (both 'free' and subscription), and it is clear users, not network providers, will be paramount.

This evolution in technology and services also challenges the utility, for antitrust analysis, of traditional measures of market power. Under the Horizontal Merger Guidelines, the DoJ and the FTC note that they will consider both the post-merger market concentrations as well as the increase in concentration resulting from a merger. However, the Guidelines stress that "in some situations, market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger".[31] These situations include where a new technology important to long-term competitiveness in the market is available to other firms in the market, but not available to a particular firm. In addition, DoJ/FTC will consider "reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data".[32]

These several qualifications, wisely built into the Merger Guidelines, recognise that traditional measures of market power such as the Herfindahl-Hirschmann Index (HHI) can only capture a snapshot of the present market, as a product of the past, and that the utility of that snapshot for predicting the future is somewhat less certain. This is particularly true at an inflection point, such as the present, on the cusp of dramatic transformations in the way information is delivered.

As of this writing, the Department of Justice has yet to actively weigh in on the changing market definitions in the telecommunications industry. In a December 2003 speech, then assistant attorney general R Hewitt Pate spoke of the changes in the industry, and the fact that the DoJ would have to review any merger between an RBOC and an IXC using a very comprehensive analysis.[33] He noted that the telecommunications industry was constantly changing, and that "telecom markets have particular characteristics that make them dynamic and create challenges in evaluating conduct and mergers under the antitrust laws". His comments indicate the Department understands that its analysis of telecommunications mergers must be flexible, and reflect the changing times and nature of the industry.

Antitrust obligations of incumbent carriers or larger industry players

The new competitive options created by technology and regulation have been accompanied by, and have even contributed to, a recognition that the obligations imposed by antitrust law on incumbents or larger industry players to assist newer/smaller competitors are limited. The US Supreme Court's decision in *Verizon Communications Inc v Law Offices of Curtis V Trinko*, LLP,[34] has become the touchstone for the application of US antitrust laws to the telecommunications industry. In *Trinko*, a customer of a new entrant local telephone service alleged that an incumbent local telephone company (Verizon) had violated its obligations under the Telecommunications Act of 1996 to provide non-discriminatory access to its network. As a result, Trinko alleged the ILEC had monopolised and attempted to monopolise in violation of Sherman Act Section 2.

The Supreme Court rejected Trinko's claims, holding that violations of regulatory duties are not, in and of themselves, violations of the antitrust laws. Indeed, the existence of a regulatory scheme aimed at fostering competition reduces the need to rely on, and therefore limits the appropriate application of, antitrust remedies. As the Supreme Court stated, "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation… One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anti-competitive harm."[35]

In addressing Trinko's claims that Verizon's actions amounted to an illegal refusal to deal, the Supreme Court reaffirmed that the antitrust laws generally do not require firms—even those with monopoly power—to assist competitors. One of the more significant comments was that *Aspen Skiing Co v Aspen Highlands Skiing Corp*,[36] was "at or near" the outer limit of what was required. In that case, the Court had held that termination of a voluntary and profitable course of conduct and refusal even to sell a product to a competitor at full retail prices violated Section 2. In *Trinko*, Verizon had not terminated a voluntary course of conduct; it was providing access to its network only because it was compelled by regulation to do so. Moreover, Verizon did not refuse to sell any service it offered to end-users at the retail price Verizon charged.[37]

Trinko also had alleged that Verizon breached its duty to make 'essential facilities' available to competitors. The Supreme Court again declined to recognise the essential facilities doctrine, but noted that in any event, a fundamental element of any such claim would be that the plaintiff does not have access to a facility it needs to compete. In this case, Trinko had access to that facility under the terms of the Telecommunications Act.[38] Thus, the existence of a regulatory requirement providing access eliminated any potential argument that such access was required by antitrust law.[39]

The *Trinko* decision has had a significant, if inconsistent, effect on other telecom antitrust litigation. Most courts have followed *Trinko* in dismissing antitrust claims that an incumbent carrier has unlawfully refused to assist or otherwise deal with a competitor.[40] One appellate court, however, refused to dismiss a claim that a incumbent local telephone company engaged in a predatory refusal to deal with a competitor's customers (as opposed to the competitor itself). In *Covad Communications Co v Bell Atlantic Corp*, Covad alleged that Bell Atlantic refused to sell high-speed DSL internet access service to customers who had purchased a competing, but not yet available, service from Covad. The appellate court ruled that this claim could not be dismissed on summary judgment, because the complaints sufficiently alleged that the refusal to deal resulted in a short-term loss.[41]

The greatest area of disagreement has been in the application of *Trinko* to allegations of a predatory 'price squeeze'. The basic allegation is that a firm sells to end-users at retail a good or service that it also sells at wholesale to its retail competitors, and the spread between the wholesale and retail prices is insufficient to provide its wholesale customer/retail competitor an opportunity to compete profitably. One appeals court has recognised that, if the antitrust laws do not compel an ILEC to deal or otherwise assist its competitors, those laws cannot compel the ILEC to sell wholesale service at a price the plaintiff finds to be reasonable.[42] It quoted a leading treatise: "it makes no sense to prohibit a predatory price squeeze in a circumstance where an integrated monopolist is free to refuse to deal."[43]

Other courts, however, have refused to dismiss price squeeze claims against ILECs. They have ruled that a price squeeze can be a form of predatory pricing, and that predatory pricing is a form of conduct that courts have found to fall squarely within the prohibitions of Section 2. Thus, in this view, an allegation that (1) the defendant is effectively pricing its retail service below an appropriate measure of cost, and (2) there is a dangerous probability that the defendant will be able to recoup its investment in below-cost prices by later being able to charge a monopoly price, states a valid claim, even if the wholesale transaction was not a voluntary one from defendant's perspective.[44]

Conclusion

Developments in 2005 continue to demonstrate that the application of US antitrust law and remedies in the telecommunications industry remains dynamic, as it is affected by changes in the marketplace and the scope of regulation.

Notes

1 Remarks by Chairman Kevin J Martin, Federal Communications Commission, to the NARUC summer meeting, Austin, Texas, 26 July 2005.

2 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Ninth Report, 19 FCC Rcd 20597 (2004) (9th Wireless Report), at A-2.

3 http://www.wow-com.com/ and http://www.wow-com.com/research-statistics/statistics/index.cfm/AID/10030

4 http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html

5 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Eighth Report, 18 FCC Rcd. 14783, at p 50 (2003) (8th Wireless Report).

6 Becky Diercks, *In-Stat*, 'Corporate Buying of Wireless Services and Equipment: 2005', February 2005 at 8. The survey takes its averages from a total of 631 interviews (97 small office/home offices, 111 small businesses (five to 99 employees), 211 mid-size businesses (100 to 999 employees), and 212 large businesses or enterprises (1,000+ employees)). Id at 5.

7 Id at 8. See also IDC, 'SMB Vertical Market Profile, 2003', January 2004 ("The mean annual spending for SMBs for wireless is $3,438, which equals $286.49 a month. The mean annual phone bill is $9,941, which equals $828 a month. Thus, SMBs are spending about 34 per cent of their monthly phone bill on wireless.").

8 See, generally, http://grouper.ieee.org/groups/802/11/main.html, Initially designed to be a wireless complement to corporate networking ('wireless LAN') with limited range between a wireless device and the 'hub' through which it connects to the wired LAN, the rapid advances in affordability and capability of the technology soon led to widespread deployment of 'hotspots' or publicly-available areas of wireless connectivity. Like all LAN technologies, at the heart of connectivity is a broadband connection to a larger network: a corporate LAN in the enterprise sector, and the internet in the case of hotspots and most home WiFi networks.

9 http://www.wimaxforum.org/about

10 http://www.qualcomm.com/technology/1xev-do/migration.html (for Qualcomm description of 1xEV-DO technology); http://www.verizonwireless.com/b2c/mobileoptions/broadband/index.jsp (for "Verizon description of its Wireless Broadband Access" service); http://www.motorola.com/mediacenter/news/detail/0,,4932-4221-23,00.html (for description of technology and equipment for Sprint's deployment of 1xEV-DO); http://www.sprint.com/business/products/phones/aircard580-connectionCards.jsp (for description of Sprint PCI card used for Sprint's 1xEV-DO service). While currently sold as a 'wireless DSL substitute' and therefore used for data connectivity with a user computer augmented with a PCI card containing the 1xEV-DO radio, future generations of the technology will support multiple services simultaneously, including voice, data and video on a single device, whether a computer (with a PCI card, currently) or a handset. This means that a personal 'handset' would be a broadband device capable of supporting voice, data, and video, and networking seamlessly with the same applications running on desktop computers at the user's enterprise.

11 http://www.ipwireless.com/technology/

12 http://www.apertonet.com/en/technoloyg/ptom.shtml

13 http://www.nextnetwireless.com/products.asp

14 "First, within four years from the effective date of this Order, the merged company will offer service in the 2.5 GHz band to a population of no less than 15 million Americans... Second, within six years from the effective date of this Order, the merged company will offer service in the 2.5 GHz band to at least 15 million more Americans in areas within a minimum of nine additional BTAs in the 100 most populous BTAs, and at least one additional BTA less populous than the nation's 200th most populous BTA.

In these additional ten BTAs, the deployment will cover at least one-third of each BTA's population." In the Matter of Applications of Nextel Communications, Inc and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations, FCC 15-048, 8 August 2005 (paras 164-165).

15 Clearwire boasts ownership by Craig McCaw, as well as the technical and operational involvement of many key players in the team that made McCaw Cellular a success. See, http://www.clearwire.com/company/leadership.htm

16 In 1998, the FCC prepared and presented to Congress the so-called Steven's Report, which addressed how evolving technology, including most significantly the internet, might affect universal telephone service. In the Matter of Federal-State Joint Board on Universal Service cc Docket No. 9645, 13 FCC Rcd 11501, release Number 98-67 released 10 April 1998. The Steven's Report, among other things, discusses the classification of VoIP services as either 'telecommunications' or 'information'.

17 Id at 11543.

18 Id at 11544. These were: (a) the provider holds itself out as providing telephone services, (b) the customer equipment (CPE) is the same as the CPE used to place calls over the PSTN, (c) the customer can dial numbers assigned under the North American Numbering Plan (ie, 'regular' telephone numbers), and (d) the service transmits customer information without a net change in form or content.

19 Id at 11544-45.

20 Petition for Declaratory Ruling That pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).

21 Id at3307.

22 Id at 3308.

23 In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22404-05 (2004).

24 However, the Commission did release a first report and order, FCC 05-116, 20 FCC Rcd 10245, in June 2005, deciding that providers of VoIP services that interconnect with the PSTN have obligations to provide 911 services, including enhanced 911 (E911). The Commission will likely continue to insist on such social obligations as 911 and E911, as well as wiretap capability such as is required in the CALEA legislation, Section 103(a) of CALEA, 47 USC Sec 1002(a). A more telling issue is whether and how VoIP will be required to "contribute to universal service" as is traditional telephony.

25 In the Matter of Applications of AT&T Wireless Services, Inc and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, 19 FCC Rcd 21522, (2004).

26 Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, GN Docket No. 00-185; CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (Cable Modem Declaratory Ruling).

27 *National Cable and Telecommunications Association v Brand X Internet Services*, 125 S Ct 2688 (2005).

28 Shortly before this writing, AOL provided a live feed of the worldwide 'Live8' concerts, which was seen by more than 5 million, and with 175,000 simultaneous video streams. The entire concert remained available online after the event as well. See, http://www.netimperative.com/2005/07/04/live8-AOL; see also http://russellbeattie.com/notebook/1008565.html

29 http://www.movielink.com

30 http://www.wired.com/news/digiwood/0,1412,68332,00.html; see also http://www.wired.com/news/culture/0,1284,66380,00.html

31 See Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1.52 (1992)

32 Id at § 1.521.

33 'Telecommunications Competition', R Hewitt Pate, speech presented at Practicing Law Institute 21st Annual Institute on Telecommunications Policy and Regulation, 4 December 2003.

34 540 US 398 (2004).

35 Id. at 411-12.

36 472 US 585 (1985).

37 540 US at 409.

38 Id at 411.

39 The Court also rejected Trinko's argument that Verizon was engaging in monopoly leveraging, stating that such a claim, if it exists at all, requires a plaintiff to establish some anti-competitive conduct, and the alleged refusal to deal here was not actionable for the reasons set forth above. Id at 415, n.4.

40 *Covad Communications Co v Bell Atlantic Corp*, 398 F.3d 666 (DC Cir 2005), pet rehearing den, 407 F.3d 1220 (2005); *MetroNet Services Corp v Qwest Corp*, 383 F.3d 1124 (9th Cir 2004); *Covad Communications Co v BellSouth Corp*, 374 F.3d 1044 (11th Cir 2004). See also *linkLine Communications, Inc v SBC California, Inc*, Order Granting in Part and Denying in Part Defendants' Motion on the Pleadings, Case No. CV 03-5265 SVW (CD Ca, 25 Oct 2004).

41 398 F.3d at 675-76.

42 *Covad v Bell Atlantic*, supra, 398 F.3d at 675.

43 Areeda & Hovenkamp, *Antitrust Law*, ¶ 773, at 199 (Supp. 2004).

44 *Covad v BellSouth*, supra, 374 F.3d at 1050-52. See also *linkLine v SBC*, supra, slip op at 28-29.

Crowell & Moring LLP

1001 Pennsylvania Avenue NW
Washington, DC 20004
Tel: +1 202 624 2500
Fax: +1 202 628 5116

Contact: Wm Randolph Smith

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